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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR AGUIRRE LOPEZ,

Defendant and Appellant.

E046923

(Super.Ct.No. RIF122227)

OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge.

Affirmed with directions.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction¹

Defendant Hector Aguirre Lopez terrorized his pregnant wife, Sandra, and her two younger sisters. For many hours, while driving overnight from Moreno Valley to Tijuana, he hit and pistol whipped Sandra causing serious injuries.

A jury convicted defendant of one count of torture (count 1), three counts of kidnapping (count 2, 3, and 4), one count of assault with a firearm (count 6), and one count of preventing the testimony of a witness (count 7), including various enhancements for use of a firearm, domestic violence, and great bodily injury.² The court sentenced defendant to a total sentence of life with the possibility of parole after 20 years.

Defendant argues there was insufficient evidence of torture, prosecutorial error, and evidentiary and instructional error. Defendant also urges this court to correct the errors in the court's minute orders and the abstract of judgment. We agree with both parties that the minute order and abstract of judgment should be corrected. Otherwise, we affirm the judgment.

2. Facts

Defendant and Sandra, the victim, have three children, one of whom was born after these events. One night in February 2005, defendant became enraged because of his suspicions about some men who were parked in a car across the street from Sandra's parents' house.

¹ All statutory references are to the Penal Code unless stated otherwise.

² Defendant was not convicted on counts 5 and 8.

Defendant brandished a gun at Sandra and her two younger sisters, Mariel and Daisy, ages 16 and 14. He smashed Mariel's phone. He forced the three sisters to get in his truck. Sandra was carrying Cassandra, a toddler. After dropping Cassandra off at a house in Moreno Valley, defendant drove to Mexico and took Sandra and her sisters to a medical clinic in Tijuana the next morning. Over the course of these events, defendant hit and pistol whipped Sandra many times, causing her to bleed profusely.

Sandra was hospitalized with bruises and cuts requiring stitches. Her right arm required surgery and both her hands were placed in casts.

Defendant had hurt Sandra previously, causing vaginal bleeding. Defendant had been physically violent against her on four other occasions.

3. Torture

We review the record in the light most favorable to the judgment to determine whether there is substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) An appellate court must presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Defendant contends there is insufficient evidence to support his torture conviction, which carries a life sentence. (§ 206.) Section 206 provides: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture."

"Torture has two elements: '(1) the infliction of great bodily injury on another;

and (2) the specific intent to cause cruel or extreme pain and suffering for revenge, extortion or persuasion or any sadistic purpose.’ (*People v. Lewis* (2004) 120 Cal.App.4th 882, 888.) It is uncontested that defendant inflicted great bodily injury. The issue is whether substantial evidence supports a finding of the second element of torture.” (*People v. Burton* (2006) 143 Cal.App.4th 447, 452.)

Defendant argues there is insufficient evidence to establish that he acted for “revenge, extortion, persuasion or for any sadistic purpose,” as required by the statute. He contends that beating Sandra severely for hours “with a gun does not qualify under anyone’s normal concept of torture” because “[o]ne would be hard pressed to describe an aggravated assault that would not qualify as an attempt at persuasion or revenge under the prosecutor’s theory.” He reasons that if what happened to Sandra qualifies as torture that “every gang fight causing serious bodily injury could be turned into torture convictions, as the assaults could certainly be said to be for the purpose of revenge or persuasion.”

Here defendant’s prolonged attack on his estranged wife was prompted by his irrational jealousy, either to seek revenge for her having cheated on him or to stop her from not cheating on him in the future. (*People v. Burton, supra*, 143 Cal.App.4th at p. 453) It was not comparable to a sudden explosion of gang violence or a spontaneous act of “animal fury,” which may not necessarily be considered to be torture. (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Davenport* (1985) 41 Cal.3d 247, 268; *People v. Walkey* (1986) 177 Cal.App.3d 268, 275-276.) We reject defendant’s effort to characterize his conduct as not sadistic and therefore not torture. Defendant’s jealous rage certainly caused him to act from motives of revenge or persuasion. Under these

circumstances, the severity of Sandra's injuries substantially supported an inference that defendant intended to torture her. (*People v. Mincey, supra*, at pp. 432-433; *People v. Crittenden* (1994) 9 Cal.4th 83, 141; *People v. Pre* (2004) 117 Cal.App.4th 413, 420-421.)

All of defendant's related appellate arguments about prosecutorial error are founded on his contention that torture did not occur and the prosecutor committed misconduct by making that argument to the jury. The court's criticisms about the tenor of prosecutor's argument were directed at the prosecutor's explanations of assault and intent, not torture. Defendant's arguments fail because we agree the evidence reasonably showed defendant committed the crime of torture for purposes of revenge or persuasion. Therefore, we do not need to evaluate the issues involving waiver and ineffective assistance of counsel. Nor is there any reason to consider defendant's assertion of cumulative error.

4. Evidence Code Section 1109

Defendant objects to the evidence concerning previous acts of domestic violence against Sandra. He challenges the constitutionality of Evidence Code section 1109 and further contends it was abuse of discretion under Evidence Code section 352 to admit the subject evidence.

Defendant raises the claim of unconstitutionality to preserve his rights to further review. But he acknowledges California courts have upheld the constitutionality of section 1109 and the related jury instruction, CALCRIM No. 852. (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251-253, citing *People v. Falsetta* (1999) 21 Cal.4th 903,

915; *People v. Reliford* (2003) 29 Cal.4th 1007, 1012; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1312; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1097; *People v. Pescador* (2004) 119 Cal.App.4th 252, 261-262; *People v. Price* (2004) 120 Cal.App.4th 224, 240.) Therefore, we reject defendant's challenge. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120.)

We also deem it was not an abuse of discretion to admit the evidence of past domestic violence. "Under Evidence Code section 352, the court has discretion to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" [Citation.] "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s). [Citations.]" (*People v. Rucker, supra*, 126 Cal.App.4th at p. 1119.)

Here the trial court held the subject evidence was relevant to defendant's history of abusing Sandra and it was not "particularly outrageous" compared to the present crimes. Nor was it unduly prejudicial, likely to confuse the jury, or time consuming.

Based on these findings, it was not an abuse of discretion to admit Sandra's brief testimony about past domestic violence. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029 [4th Dist., Div. 2].)

5. The Judgment

We order the court minutes and the abstract of judgment to be corrected. The court, in its oral pronouncement of judgment, sentenced defendant to life in prison with the possibility of parole after seven years for count 1, the torture conviction. The court imposed an additional consecutive 10-year term for personal use of a firearm and a consecutive three-year term for inflicting great bodily injury. The total sentence for torture was life in prison with the possibility of parole after 20 years. The court stayed sentence on count 6 and imposed concurrent terms on counts 2, 3, 4, and 7 and the various other enhancements.

The court minutes incorrectly state the enhancements on count 2 (13 years) and the sentence on count 6 were imposed consecutively. The minutes also incorrectly state defendant was sentenced pursuant to section 667.61 and sentenced to an indeterminate sentence of 25 years to life. The abstract of judgment repeats all the same errors.

6. Disposition

We order the court minutes and the abstract of judgment to be corrected to reflect the sentence pronounced by the trial court as discussed above. Otherwise, we affirm the judgment.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.